Office - Supreme Court, U.S.
FILED
MAR 20 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1016

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOHN J. HARRINGTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether, assuming that agents of the Customs Service lacked statutory authority to apply for and execute a search warrant, evidence obtained by those agents as a result of a warrant-authorized search should be suppressed.

2. Whether the government interfered with petitioner's Sixth Amendment right to counsel by negotiating with a witness who previously had been represented by petitioner's counsel.

3. Whether the evidence established single or multiple conspiracies.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	7
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Alderman v. *United States*, 394 U.S. 165	6, 10
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984)	7
Franks v. *Delaware*, 438 U.S. 154	10
United States v. *Arbelaez*, 719 F.2d 1453, cert. denied, No. 83-6739 (June 18, 1984)	12
United States v. *Brito*, 721 F.2d 743	12
United States v. *Burke*, 517 F.2d 377	8
United States v. *Caceres*, 440 U.S. 741	8
United States v. *Cruz*, 594 F.2d 268, cert. denied, 444 U.S. 898	10
United States v. *Darby*, 744 F.2d 1508	12
United States v. *Dickey*, 736 F.2d 571, cert. denied, No. 84-372 (Jan. 21, 1985)	12
United States v. *Drougas*, 748 F.2d 8	12
United States v. *Finch*, 679 F.2d 1083	7
United States v. *Gibson*, 500 F.2d 854, cert. denied, 419 U.S. 1106	10
United States v. *Hasting*, 461 U.S. 499	12
United States v. *Kalish*, 690 F.2d 1144, cert. denied, 459 U.S. 1108	12
United States v. *Leon*, No. 82-1771 (July 5, 1984)	9
United States v. *Morrison*, 449 U.S. 361	11
United States v. *Nichols*, 741 F.2d 767, cert. denied, No. 84-985 (Feb. 19, 1985)	12
United States v. *Payner*, 447 U.S. 727	8

Cases—Continued: Page

United States v. *Pennington*, 635 F.2d 1387, cert. denied, 451 U.S. 938 8
United States v. *Sarmiento*, No. 84-5305 (11th Cir. Jan. 21, 1985) 8
United States v. *Stewart*, 700 F.2d 702 7
United States v. *Warner*, 690 F.2d 545 12
United States v. *Wright*, 524 F.2d 1100 10
Weatherford v. *Bursey*, 429 U.S. 545 11

Constitution, statutes and regulation:

U.S. Const.:
Amend. IV 8, 10
Amend. V (Due Process Clause) 10
Amend. VI 10
Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 320, 98 Stat. 2056 (to be codified at 19 U.S.C. 1589) 8-9
21 U.S.C. 841(a)(1) 2
21 U.S.C. 952(a) 2
Reorg. Plan. No. 2 of 1973, 3A C.F.R. 263 (1973), as amended by the Act of Mar. 16, 1974, Pub. L. No. 93-253, 88 Stat. 50 *et seq.* 5, 6, 7, 8

Miscellaneous:

H.R. Rep. 98-845, 98th Cong., 2d Sess., Pt. 1 (1984) 9

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1016

JOHN J. HARRINGTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 84-87) affirming petitioner's conviction is unreported.

The following opinions and orders rendered earlier in this case also are relevant to the first question presented in the petition: The opinions of the district court granting petitioner's motion to suppress evidence (Pet. App. 42-53, 54-71), reported at 520 F. Supp. 93 and 524 F. Supp. 292; the opinion of the court of appeals reversing the district court's orders suppressing evidence (Pet. App. 72-77), reported at 681 F.2d 612; and the order of the district court on

remand denying petitioner's motion to suppress (Pet. App. 42-44), which is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1984. A petition for rehearing was denied on October 22, 1984 (Pet. App. 41). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Eastern District of California, petitioner was convicted of conspiracy to import marijuana in hashish form, in violation of 21 U.S.C. 841 (a)(1) and 952(a). He was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. 84-87).

1. The evidence at trial established that petitioner was part of a major hashish smuggling conspiracy. The conspirators were shown to have conspired to transport large amounts of currency from the United States to foreign suppliers of hashish and to import about 16,000 pounds of hashish into this country. Petitioner stipulated that there was a conspiracy between the named defendants (except for petitioner and one other) from an unknown date until October 17, 1980, and that six of the named defendants, Perri, Ashbrook Amhaz, Scott, Graves, and Steinmetz, were the "core" conspirators (Tr. 403-404, 709).

a. In October 1978, Special Agent Vernon Pitsker of the United States Customs Service received information that a man later identified as defendant Ashbrook had paid $10,000 in cash to charter a jet aircraft from Long Beach, California, to Puerto Rico (Affidavit of Agent Pitsker (June 6, 1980) ¶ 22

[hereinafter cited as Pitsker Aff.]).[1] In light of his experience as an agent with the Customs Service, Agent Pitsker suspected that Ashbrook might be violating the currency laws, and he therefore began an investigation of the matter (*id.* ¶¶ 23, 28).

In the fall of 1979, Agent Pitsker learned Ashbrook's true identity and discovered that Ashbrook was a fugitive wanted on federal and state warrants and that Ashbrook previously had been involved with a large drug smuggling organization (Pitsker Aff. ¶ 11). At that point, Agent Pitsker became suspicious that Ashbrook and others were violating the currency laws in connection with a narcotics smuggling enterprise, and he therefore continued his investigation (*id.* ¶¶ 24-28).

In the course of his investigation, Agent Pitsker worked closely with officials from several other agencies that were investigating Ashbrook, including the federal Drug Enforcement Administration (Pitsker Aff. ¶¶ 2, 11, 14-16, 19, 21, 24-25, 28-29, 33, 44, 47, 50(i), 52(c) 53(d)). By June 1980, the overall investigation had reached a point at which the Department of Justice determined that a wiretap order would be necessary to continue the investigative effort. Accordingly, the government prepared a wiretap application that was supported by an affidavit from Agent Pitsker. The district court granted the application and entered an order authorizing both DEA and Customs Service agents to intercept wire communications to and from Ashbrook and others, but not including petitioner. The wiretap authorization was renewed on several occasions.

---

[1] Agent Pitsker's affidavit was submitted to the district court as an exhibit to the government's opposition to petitioner's motion to suppress evidence.

b. During the investigation of Ashbrook, Customs agents discovered petitioner's role in the conspiracy. While conducting surveillance of Ashbrook during what they suspected was a narcotics deal, Customs agents spotted a Mercedes Benz automobile of the type and description owned by petitioner, who was discovered to be using an alias (E.R. 69-70, 140-141).[2] Subsequently, the agents obtained evidence that petitioner had purchased drugs from Ashbrook (E.R. 72, 142). Telephone toll records also revealed numerous calls between petitioner's residence and the residences of other suspected co-conspirators (E.R. 76, 140), and on several occasions in the fall of 1980 petitioner was observed in one of the co-conspirators' residences using drugs and discussing drug smuggling and criminal trials (E.R. 77-79, 140-141).

Based on this information, Customs Agent John F. Kellogg prepared an affidavit for a warrant to search petitioner's residence (E.R. 66-81, 109). In his affidavit, Agent Kellogg incorporated by reference Agent Pitsker's wiretap applications, which provided probable cause to believe that petitioner, together with 11 other named persons (including Ashbrook), was committing various offenses, including racketeering, drug, and currency violations (E.R. 68-69). On October 16, 1980, a magistrate authorized agents of the Customs Service and other law enforcement officers to search petitioner's home for evidence of racketeering, drug, or currency offenses. Customs and DEA agents executed the warrant together (E.R. 105 n.9) and discovered $100,000 in currency and a variety of illegal drugs (E.R. 24-25).

---

[2] "E.R." refers to the Excerpts of Record prepared in connection with the government's appeal from the district court's orders suppressing evidence.

2. The district court ordered suppression of the evidence taken from petitioner's home, holding that Customs agents do not have the authority to apply for and execute search warrants in the course of investigations of the federal narcotics laws (Pet. App. 45-53, 54-71). Relying on Reorg. Plan No. 2 of 1973, 3A C.F.R. 263 (1973), as amended by the Act of Mar. 16, 1974, Pub. L. No. 93-253, 88 Stat. 50 *et seq.*, the district court concluded that the Department of Justice is vested with sole authority for the investigation of narcotics offenses, except when the drug violations occur at the border. Because Customs agents obtained the warrant to search petitioner's residence and participated in the execution of that warrant, the district court held that the evidence seized under the authority of the warrant would have to be suppressed (Pet. App. 45-53, 54-71).

On the government's appeal, the Ninth Circuit held that "a court should not automatically suppress evidence seized by an officer who, for some technical reason, should not have conducted the search" (Pet. App. 77). Instead, the court of appeals ruled that there "must be an exceptional reason, typically the protection of a constitutional right, to invoke the exclusionary rule" (*ibid.*).[3] Concluding that there was no such exceptional reason to justify suppression in this case, the court of appeals reversed and remanded with instructions to admit the evidence seized from petitioner's residence (*id.* at 72).

On remand, the district court held that petitioner had failed to establish that the Customs agents had deliberately violated the Reorganization Plan of 1973;

---

[3] The court of appeals did not decide whether the Customs agents actually had authority to search in this case because it found the record unclear on this point (Pet. App. 77 n.1).

indeed, the court concluded that "the spirit and the letter of the Reorganization Plan was met" because Customs and DEA had worked together on the investigation (Tr. 243-244). Accordingly, the district court denied petitioner's renewed motion to suppress.

4. The court of appeals affirmed petitioner's conviction (Pet. App. 84-87). The court adhered to its earlier decision that the exclusionary rule was inapplicable in this case (*id.* at 85). The court further held, on the basis of *Alderman* v. *United States*, 394 U.S. 165 (1969), that petitioner could not challenge the wiretap affidavits incorporated into the search warrant for his home because the wiretaps were not directed at him and none of his conversations was intercepted (Pet. App. 85). The court also rejected as without foundation in fact petitioner's claims that the government suborned perjury of a witness and intercepted privileged matters by negotiating with the witness while he and petitioner were jointly represented by a single attorney (*id.* at 85-86). Finally, the court rejected petitioner's claim that the government's proof had varied from the indictment by establishing three conspiracies instead of the single conspiracy charged in the indictment (*id.* at 86-87).

ARGUMENT

1. Petitioner contends (Pet. 9-22) that the court of appeals should have applied the exclusionary rule to the fruits of the search of petitioner's home because the Customs agents had no authority to obtain and execute the search warrant. For several independent reasons, petitioner's argument is erroneous.

First, the district court's ultimate determination, not disturbed by the court of appeals, was that both "the spirit and the letter of the Reorganization Plan" were satisfied in this case (Tr. 243-244). This conclusion is unassailable in light of the fact that the search of petitioner's home was conducted jointly by Customs agents and DEA agents. The Reorganization Plan of 1973 vested primary jurisdiction for inland drug investigations in the DEA, but the Attorney General was nonetheless authorized to seek assistance from other agencies. In furtherance of that authority, Customs and DEA entered into a Memorandum of Understanding that specifically recognizes Customs' supportive role in drug smuggling and trafficking investigations.[4] This administrative interpretation of the Reorganization Plan by the enforcing agencies is entitled to great weight. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 6-7. Thus, other courts of appeals have interpreted the Reorganization Plan to authorize joint Customs-DEA investigations. See *United States* v. *Stewart*, 700 F.2d 702, 705-706 (11th Cir. 1983); *United States* v. *Finch*, 679 F.2d 1083, 1085 (4th Cir. 1982).

---

[4] A copy of the Memorandum of Understanding is appended to the brief filed by the government in its appeal of the district court's initial suppression ruling (No. 81-1672 (9th Cir.)).

Second, even if it be assumed that Customs agents should not have applied for a warrant to search petitioner's residence, the court of appeals was clearly correct in holding that the exclusionary rule may not be invoked in response to nonconstitutional violations of law absent exceptional circumstances.[5] See, *e.g.*, *United States* v. *Caceres*, 440 U.S. 741 (1979); *United States* v. *Pennington*, 635 F.2d 1387 (10th Cir. 1980), cert. denied, 451 U.S. 938 (1981); *United States* v. *Burke*, 517 F.2d 377 (2d Cir. 1975); but see *United States* v. *Sarmiento*, No. 84-5305 (11th Cir. Jan. 21, 1985), reh'g pending. The authority of Customs agents to apply for warrants and to conduct searches raises no Fourth Amendment issue. The Reorganization Plan of 1973 specifies the law enforcement duties of various federal agencies, but it codifies no defendant's rights, constitutional or otherwise. As the court of appeals noted (Pet. App. 73), the Reorganization Plan was intended to enhance federal efforts against drug offenders. It certainly was not designed to generate new protections for the benefit of the subjects of those enforcement efforts. Application of the exclusionary rule in these circumstances would turn the intent of the Reorganization Plan on its head.

Third, recent legislation makes the issue of Customs' authority to apply for and execute warrants a matter of no continuing importance. Section 320 of the Comprehensive Crime Control Act of 1984, Pub.

---

[5] Because it found no basis whatsoever for suppression in this case, the court of appeals declined to decide whether, in light of *United States* v. *Payner*, 447 U.S. 727 (1980), the exclusionary rule ever can be invoked in the absence of a constitutional violation (Pet. App. 77). In light of petitioner's failure to present any remotely colorable reason in support of suppression, this issue need not be addressed.

L. No. 98-473, 98 Stat. 2056 (to be codified at 19 U.S.C. 1589), specifically authorizes Customs agents to execute and serve warrants. A House report accompanying an earlier version of the bill stated specifically that Customs was being given authority to conduct searches in part to eliminate the problems created by the district court in this case when it initially suppressed the evidence obtained from petitioner's home. H.R. 98-845, 98th Cong., 2d Sess., Pt. 1, at 28 (1984). It is thus inconceivable that Congress could have intended the imposition of a judicially-created exclusionary remedy for a "violation" that it eliminated by statute.

Finally, in *United States* v. *Leon*, No. 82-1771 (July 5, 1984), this Court refused to suppress evidence obtained by the police in reasonable reliance on a search warrant that ultimately was held to be invalid. The Court concluded that the costs of applying the exclusionary rule in such circumstances outweighed whatever speculative deterrent effect the rule might promote. *Leon*, slip op. 7-14, 18-23. In the instant case, the argument for applying the exclusionary rule carries even less weight than it did in *Leon*. In *Leon*, it had been determined that the police lacked probable cause for the warrant they obtained. Slip op. 3-5. Here, by contrast, the district court specifically found that "the application for and execution of the warrant was technically perfect" (Pet. App. 64). In these circumstances, no possible deterrent effect could be achieved through suppression.[6]

---

[6] As part of his argument for suppression, petitioner contends (Pet. 22-31) that he should have been allowed to show that the Customs agents misrepresented their authority to search in their applications to tap the telephones of some of petitioners' co-conspirators. Petitioner apparently contends

2. Petitioner alleges (Pet. 31-34) that the government suborned perjury by a key government witness during a period when that witness and petitioner were represented by the same attorney; that, he asserts, coupled with the government's failure to notify the attorney of its contacts with the witness, violated petitioner's rights under the Due Process Clause of the Fifth Amendment and his Sixth Amendment right to counsel. Petitioner's contentions are utterly lacking in factual support.

---

that suppression would deter such misrepresentations in the future. As we have already shown, however, the district court's ultimate conclusion that the Customs agents were authorized to conduct this investigation is correct. Thus, the agents did not misrepresent their authority in the wiretap applications. In any event, the recent legislation expanding the search authority of Customs agents (see pages 8-9, *supra*) means that no prospective deterrence is required.

We also note that petitioner's argument that he is entitled under *Franks* v. *Delaware*, 438 U.S. 154 (1978), to attack the veracity of the agents' allegations is incorrect, because *Franks* permits such challenges only if the allegedly false statements are necessary to the finding of probable cause under the Fourth Amendment. Petitioner has no Fourth Amendment claim in this case, and thus *Franks* is simply inapplicable. Finally, petitioner lacks "standing" to mount a direct challenge to the wiretap applications inasmuch as the interceptions were not directed at him and none of his conversations was intercepted. *Alderman* v. *United States*, 394 U.S. 165 (1969). And he cannot attack them indirectly even though they formed part of the basis for the search warrant for his home. The "fruit of the poisonous tree" doctrine does not extend so far as to allow a defendant to rely on alleged violations of the constitutional rights of others. See *United States* v. *Cruz*, 594 F.2d 268, 273-274 (1st Cir.), cert. denied, 444 U.S. 898 (1979); *United States* v. *Wright*, 524 F.2d 1100, 1102 (2d Cir. 1975); *United States* v. *Gibson*, 500 F.2d 854, 855 (4th Cir. 1974), cert. denied, 419 U.S. 1106 (1975).

From October 1980 through March 1981, petitioner and a co-defendant, Chester Bowyer, both were represented by Joseph Milchen (Tr. 266). Bowyer then obtained another lawyer and, through his new counsel, contacted the government in May 1981 about cooperating with the prosecution (Tr. 310-311). During negotiations, Customs agents released money taken from the search of a co-conspirator's home to Bowyer (Tr. 381). Petitioner apparently contends that the government's release of the money to Bowyer constituted subornation of perjury and that the government's contacts with Bowyer interfered with petitioner's attorney-client relationship (see Pet. App. 85).

As the court of appeals recognized (Pet. App. 85-86), petitioner established neither that the government suborned perjury nor that the government was negotiating with Bowyer while he and petitioner were represented by the same attorney. Petitioner's perjury claim is unsupported by "any examples of false testimony that were allegedly provided" (*id.* at 85). And petitioner's claim that his privileged communications may have been intercepted is contradicted by the record, which establishes that petitioner's attorney had ceased representing Bowyer months before Bowyer contacted the government (*id.* at 86). Thus, the government had no duty to notify petitioner's attorney that Bowyer was cooperating with the prosecution. In any event, petitioner has not established any prejudice from the alleged interception of his privileged communications. See *Weatherford* v. *Bursey*, 429 U.S. 545 (1977). Absent a demonstration of prejudice, petitioner is not entitled to relief. See *United States* v. *Morrison*, 449 U.S. 361 (1981). For the same reason, petitioner's invocation (Pet. 34) of

this Court's supervisory powers is misplaced. *United States* v. *Hasting*, 461 U.S. 499 (1983).

3. Petitioner finally contends (Pet. 34-38) that the government's proof varied from the indictment because it established not one but three distinct conspiracies. The court of appeals correctly rejected petioner's fact-bound claim. As the court noted (Pet. App. 87), the key figures in the conspiracy remained the same during the relevant time period, and the conspirators had only one common scheme to import marijuana. This evidence established the existence of a single conspiracy. See, *e.g.*, *United States* v. *Drougas*, 748 F.2d 8, 16-18 (1st Cir. 1984); *United States* v. *Darby*, 744 F.2d 1508, 1542 (11th Cir. 1984); *United States* v. *Nichols*, 741 F.2d 767, 771-772 (5th Cir. 1984), cert. denied, No. 84-985 (Feb. 19, 1985); *United States* v. *Dickey*, 736 F.2d 571, 581-583 (10th Cir. 1984), cert. denied, No. 84-372 (Jan. 21, 1985); *United States* v. *Arbelaez*, 719 F.2d 1453, 1457-1459 (9th Cir. 1983), cert. denied, No. 83-6739 (June 18, 1984). The commission of crimes at different times, or a shuffle of personnel within the conspiracy, do not, either alone or in combination, establish multiple conspiracies. *United States* v. *Brito*, 721 F.2d 743, 747 (11th Cir. 1982); *United States* v. *Kalish*, 690 F.2d 1144, 1151-1152 (5th Cir.), cert. denied, 459 U.S. 1108 (1983); *United States* v. *Warner*, 690 F.2d 545, 549 & n.7 (6th Cir. 1982).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

THOMAS E. BOOTH
Attorney

MARCH 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10194